

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
726 MINNESOTA AVENUE
KANSAS CITY, KANSAS 66101



IN THE MATTER OF:)

THE HASTINGS, NEBRASKA)
GROUND WATER CONTAMINATION SITE)
COLORADO AVENUE SUBSITE)

EPA Docket No.
VII-90-F-0025

Burlington Northern)
Railroad Company, Inc.)
Zuber Company)
and)
Morton Zuber,)

Respondents.)

Proceeding under Section 122)
(g)(4) of the Comprehensive)
Environmental Response,)
Compensation, and Liability)
Act of 1980, as amended,)
42 U.S.C. §9622(g)(4).)

Now on this 12 day of June 1992, the United States Environmental Protection Agency (EPA), having considered all comments filed with EPA addressing the proposed de minimis settlement at the Colorado Avenue Subsite of the Hastings Ground Water Contamination Site with the above-captioned parties, does hereby find that the comments submitted do not disclose facts nor considerations which indicate the proposed settlement is inappropriate, improper, or inadequate. Comments did indicate that a statement of fact in the proposed settlement order concerning the manner in which Morton Zuber acquired property was erroneously stated. This statement has been corrected to state as follows in Paragraph 12 of the proposed settlement order:

Morton Zuber acquired title to this property by
quitclaim deed in 1984.

EPA also finds, pursuant to Section 122(g) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended, 42 U.S.C. §9622(g), that this


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settlement is practicable and in the public interest, as it will facilitate the remediation of soil and ground water at the Colorado Avenue Subsite by granting access in an expeditious manner to any party who conducts environmental response actions under EPA oversight and by causing property to be cleared to enable all necessary response actions to be implemented.

NOW THEREFORE, the proposed de minimis settlement between Robert Zuber, Zuber Company, Burlington Northern Railroad Company, Inc. and the United States Environmental Protection Agency is a final settlement.



MORRIS KAY
Regional Administrator
Region VII, EPA

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Proceeding under Section 122
(g) (4) of the Comprehensive
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Act of 1980, as amended,
42 U.S.C. § 9622(g)(4).

EPA Docket No. _____
VII-90-F-0025

ADMINISTRATIVE ORDER
ON CONSENT

I. JURISDICTION

1. This Administrative Order on Consent ("Consent Order") is issued pursuant to the authority vested in the President of the United States by Section 122 (g)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"), Pub. L. No. 99-499, 42 U.S.C. § 9622 (g)(4), to reach settlements in actions under Section 106 or 107(a) of CERCLA, 42 U.S.C. § 9606 or 9607(a). The authority vested in the President has been delegated to the Administrator of the United States

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Environmental Protection Agency ("EPA") by Executive Order 12580, 52 Fed. Reg. 2923 (Jan. 29, 1987), and further delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-E (Sept. 13, 1987).

2. This Administrative Order on Consent is issued to Burlington Northern Railroad Company, Inc. ("BNRR") and Zuber Company/ Morton Zuber ("Zuber") (collectively "Respondents"). Respondents agree to grant access to the property they own and/or lease as required by the terms and conditions of this Consent Order. Access onto the site by EPA or its contractors is authorized by Section 104(e)(3) of CERCLA. Respondents further consent to and will not contest EPA's jurisdiction to issue this Consent Order or to implement or enforce its terms.

II. STATEMENT OF FACTS

2. Hastings Ground Water Contamination site encompasses an area in south central Nebraska, in and around the City of Hastings, Adams County, Nebraska as denoted in Attachment 1, a map attached hereto and incorporated herein.

4. Hastings Ground Water Contamination site was listed on the National Priorities List in May 1986.

5. Hastings Ground Water Contamination site consists of several subsites. These subsites include, but are not limited to, Colorado Avenue, FAR-MAR-CO, the North Landfill, the South Landfill, Well #3, and the Naval Ammunition Depot.

6. The Colorado Avenue subsite (the Subsite) is contained within the area bounded by Kansas Avenue on the west, South

Street on the south, Wabash Avenue on the east and the BNRR tracks on the north. The Subsite is depicted in Attachment 2, attached hereto and incorporated herein.

7. Trichloroethylene (TCE), 1,1,1- trichloroethane (TCA), and tetrachloroethene (PCE) are hazardous substances within the definition of Section 101 (14) of CERCLA, 42 U.S.C. § 9601 (14).

8. TCE, TCA, and PCE have been released at the Subsite. Specifically, in 1983, sampling and analysis performed by the State of Nebraska confirmed the presence of TCE, TCA, and PCE in a municipal supply well located approximately one-half mile east and downgradient of the Subsite. Sampling and analysis performed by EPA between 1986 and 1988 confirmed the presence of TCE, TCA, and PCE in the soils and soil-gas near a storm sewer line which originates underneath the 108 S. Colorado Avenue property and runs eastbound onto property owned by the BNRR. EPA sampling and analysis also confirmed the presence of TCE, TCA, and PCE near a sanitary sewer line which runs northbound on Colorado Avenue, perpendicular to the above-mentioned storm sewer. In addition, EPA sampling and analysis confirmed the presence of TCE, TCA, and PCE in ground water at and near the Subsite.

9. BNRR acquired its property at the Subsite by quitclaim deed in 1871.

10. The BNRR property at the Subsite consists of railroad tracks that run through the Subsite between Kansas Avenue and Wabash Avenue. In addition, BNRR owns 200 feet of property (100

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feet on either side of the tracks). For purposes of this Consent Order, property at this Subsite owned by BNRR shall be referred to as BNRR property.

11. BNRR represents, and for the purposes of this Consent Order EPA accepts, that BNRR has not conducted or permitted the generation, transportation, storage, treatment, or disposal of TCE, TCA, or PCE on its property at the Subsite and has not contributed to the release or threat of release of any hazardous substance at the Subsite through any action or omission.

12. Morton Zuber has been leasing property at the Subsite from BNRR since 1984. Zuber Company uses this property to store scrap metal. Morton Zuber also owns property at the Subsite south and adjacent to the BNRR property, including the building at 101 S. Colorado Avenue which is east of 108 S. Colorado Avenue. Zuber Company operates a scrap metal business at 101 S. Colorado Avenue. Morton Zuber acquired title to this property by bequest in 1984. For purposes of this Consent Order, property at the Subsite owned or leased by Zuber, shall be referred to as Zuber property.

13. Zuber represents, and for the purposes of this Consent Order, EPA accepts that Zuber has not conducted or permitted the generation, transportation, storage, treatment, or disposal of TCE, TCA, or PCE on the property it owns or leases at the Subsite and has not contributed to the release or threat of release of any hazardous substance at the Subsite through any action or omission.

14. The 108 S. Colorado Avenue property located at the Subsite was the location of Hastings Industries, Inc. (HII) between 1965 through 1968. HII used TCE in its vapor degreasing process and disposed of TCE into a drain that led to the sanitary sewer described in Paragraph 8 herein. Dravo Corporation ("Dravo") purchased the property in 1968 and continued the same line of business as HII until 1982. Dravo also used TCE and subsequently used TCA in its vapor degreasing process. Dravo disposed of TCA and TCE into a drain that led either to the sanitary sewer or the storm sewer discussed in Paragraph 8 herein.

15. Marshalltown Instruments, Inc. (Marshalltown) purchased the 108 S. Colorado Avenue property in December 1983 and began operating as a manufacturing plant in February 1984. Marshalltown has been using TCA in its vapor degreasing process at 108 S. Colorado Avenue since February 1984.

16. Several breaks in the storm sewer line, discussed in Paragraph 8 herein have been found to exist between 108 S. Colorado Avenue and the property to the east that is owned by BNRR and leased or otherwise used by Zuber.

17. Current information indicates that TCE, TCA, and PCE contamination found on the BNRR property, some of which is leased or otherwise used by Zuber, was caused solely by the acts and omissions of third parties, including but not limited to HII, Dravo, and/or Marshalltown. Neither BNRR nor Zuber have ever had a contractual relationship, as defined by Section 101 (35) of

CERCLA, 42 U.S.C. § 9601 (35), with HII, Dravo, or Marshalltown.

18. A Record of Decision (ROD) for the Colorado Avenue Subsite was entered on September 30, 1988. The ROD selected soil vapor extraction (SVE) as the technology for remediation of contaminated soils at the Subsite.

19. Pursuant to an Administrative Order on Consent, Docket No. VII-88-F-0021, December 13, 1988, Dravo, Marshalltown, Farmland Industries, Inc. and Morrison-Quirk Grain Corporation agreed to implement a pilot study to determine the efficacy of SVE to withdraw TCE and other hazardous substances from the soils at the Subsite. The parties to the aforementioned order installed the SVE pilot system and stored equipment on property at the Subsite owned by BNRR which is leased by Zuber.

20. An Administrative Record for the Hastings Ground Water Contamination Site was placed in the Hastings Public Library, Hastings, Nebraska in September 1988. The Administrative Record was supplemented with documents which support the response action selected by EPA for the Colorado Avenue Subsite.

III. DETERMINATIONS

Based on the Findings of Fact set forth above and on the administrative record for this Subsite, EPA has determined that:

21. The Subsite as described in Paragraph 6 of this Consent Order is a "facility" as that term is defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601 (9).

22. Respondents are each a "person" as that term is defined in Section 101 (21) of CERCLA, 42 U.S.C. § 9601 (21).

23. Respondents are each an "owner" of a facility within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607 (a)(1), and are each a "potentially responsible party" within the meaning of Section 122 (g)(1) of CERCLA, 42 U.S.C. § 9622 (g)(1).

24. The past, present or future migration of hazardous substances from the Subsite constitutes an actual or threatened "release" as that term is defined in Section 101 (22) of CERCLA, 42 U.S.C. § 9601 (22).

25. Prompt settlement with Respondents is practicable and in the public interest within the meaning of Section 122 (g)(1) of CERCLA, 42 U.S.C. § 9622 (g)(1).

26. Respondents are each eligible for a de minimis settlement pursuant to Section 122 (g)(1)(B) of CERCLA, 42 U.S.C. § 9622 (g)(1)(B).

IV. ORDER

Based upon the Findings of Fact and Determinations set forth above, and in consideration of the promises and covenants set forth herein, it is hereby AGREED TO AND ORDERED:

27. Respondents hereby grant an irrevocable right of access to the property they own or lease between Kansas Avenue and Pine Avenue, identified in Attachment 2, incorporated herein, for the sole purposes of performing response actions as defined by CERCLA. This access is granted to EPA, its representatives, contractors and agents, the Nebraska Department of Environmental Control (NDEC), and all other persons performing response actions under EPA's oversight. Respondents shall file in the land re-

ords of Adams County, Nebraska a notice, approved by EPA, to subsequent purchasers of the land, that hazardous substances were disposed of on the Subsite and that EPA makes no representations as to the appropriate use of the property. Nothing in this Consent Order shall in any manner restrict or limit the nature or scope of response actions which may be taken by EPA in fulfilling its responsibilities under federal law. Respondents recognize that the implementation of response actions at the Site may interfere with the use of their property. Respondents agree to cooperate with EPA in the implementation of response actions at the Site and further agree not to interfere with such response actions.

28. When EPA, its representatives, contractors or agents, require access to BNRR or Zuber property, such parties seeking access, whenever practicable, shall provide advance notice by telephone to BNRR's Environmental Engineer 24 hours prior to the date that access is desired. Notice shall be confirmed in writing. EPA will advise the NDEC and all other persons performing response actions under EPA's oversight to comply with the notice provisions discussed in this paragraph.

29. When response actions are performed at the Subsite by EPA, its representatives, contractors or agents, such parties shall make reasonable efforts to avoid interference with the use of the railroad tracks, the operation of trains communications, or other BNRR facilities. EPA and its representatives,

contractors or agents will make reasonable efforts not to enter within 15 feet of the centerline of any trackage of BNRR nor place any material structure, obstruction or drill any hole within 15 feet of the centerline of any trackage. EPA will notify the NDEC and all other persons performing response actions under EPA's oversight to comply with the provisions of this paragraph.

30. If BNRR transfers title to the property it owns that is part of this Subsite or arranges for anyone other than Zuber to lease from BNRR property that is part of this Subsite, BNRR shall require the new owner or new lessee, as a condition of the transfer or lease, to grant an irrevocable right of access to EPA, its representatives, contractors and agents, the NDEC, and, all other persons performing response actions under EPA's oversight. Such a requirement shall be in the form of a written agreement, signed by BNRR and the subsequent owner or tenant, and shall be provided to EPA within 10 calendar days of the effective date of the aforementioned transfer or lease. Failure to comply with this provision shall be considered a violation of this Order and will subject BNRR to penalties set forth in Article VII of this Consent Order.

31. If Zuber transfers title or leases to another property that is part of this Subsite, Zuber shall require the new owner, as a condition of the transfer of title or lease, to grant an irrevocable right of access to EPA, its representatives, contractors and agents, the NDEC, and all other persons

performing response actions under EPA's oversight. Such a requirement shall be in the form of a written agreement, signed by Zuber and the subsequent owner or lessee, and shall be provided to EPA 10 calendar days prior to the effective date of the aforementioned transfer. Failure to comply with this provision shall be considered a violation of this Order and will subject Zuber to penalties set forth in Article VII of this Consent Order.

32. Whenever practicable, EPA, its representatives, contractors or agents, shall provide Zuber with thirty (30) calendar days notice of their need to enter the Zuber property so that Zuber will move scrap metal inventory or other personal property to provide adequate access for drilling deep wells and trenching to make connections. Zuber may request an extension of time; whenever practicable, such extension of time shall be granted. Additionally, Zuber will provide access to the aforementioned parties for monitoring equipment that has been installed on the Zuber property. EPA will notify the NDEC and all other persons performing response action under EPA's oversight to comply with the provisions of this paragraph.

33. When access to Zuber property is needed for the purpose of installing shallow wells, EPA, its contractors or agents, shall, whenever practicable, notify Zuber 60 days prior to seeking access. EPA will advise NDEC and any other persons performing response actions under EPA's oversight to comply with the provisions of this paragraph.

34. To the extent possible, while conducting response actions, EPA, its representatives, contractors or agents will take reasonable measures to avoid interference with the operations and business of Zuber, but subject to Zuber providing access and clearance as set out in Paragraph 32 and 33. EPA will make reasonable efforts to avoid drilling in the area designated on Attachment 3, attached hereto and incorporated herein, and to locate the SVE system in the area designated on Attachment 3. EPA will advise the NDEC and any other persons performing response actions under EPA's oversight to comply with the provisions in this paragraph.

35. If EPA, its representatives, contractors or agents undertakes the operation of the soil vapor extraction (SVE) system on Zuber property, such person will make reasonable efforts to insulate the equipment used in the SVE system and to place it in an enclosure on the eastern edge of the BNRR property leased by Zuber, but subject to any easements. EPA will advise the NDEC and all other persons performing response actions under EPA's oversight to comply with the provisions in this paragraph.

V. EPA ACTIVITIES

36. Upon completion of response actions undertaken at the Subsite by EPA, its representatives, contractors, and agents, EPA, its representatives, contractors and agents will take reasonable measures to leave the property owned by Respondents in a condition reasonably similar to the condition the property was

in prior to their entry. EPA will advise the NDEC and all other persons performing response actions under EPA's oversight to comply with the provisions in this paragraph. When performing response actions at the Subsite, EPA's potential liability shall be to the extent permitted under the Federal Tort Claims Act, 28 U.S.C. § 2671 et. seq., 5 U.S.C. § 8101 et. seq., and 31 U.S.C. § 3701 et. seq.

VI. DUE CARE

37. Nothing in this Consent Order shall be construed to relieve Respondents of their duty to exercise due care with respect to the hazardous substances at the Subsite or their duty to comply with all applicable laws and regulations.

VII. CIVIL PENALTIES

38. In addition to any other remedies or sanctions available to EPA, if Respondents fail or refuse to comply with any term or condition of this Consent Order, Respondents shall be subject to a civil penalty of up to \$25,000 per day for such failure or refusal pursuant to Section 122(1) of CERCLA, 42 U.S.C. § 9622(1).

VIII. CERTIFICATION OF RESPONDENTS

39. Respondents certify that, to the best of their knowledge and belief, they have fully and accurately disclosed to EPA and stated in Paragraphs 9, 10, 11, 12, and 13, all information currently in their possession and in the possession of their agents, officers, directors, employees, contractors which relates

in any way to their qualifications for a de minimis settlement under Section 122 (g)(1)(B) of CERCLA, 42 U.S.C. § 9622(g)(1)(B).

IX. COVENANT NOT TO SUE

40. Subject to the reservations of rights in Article X of this Consent Order, EPA covenants not to sue or to take any other civil or administrative action against Respondents for "Covered Matters." "Covered Matters" shall include any and all civil liability for reimbursement of response costs or for injunctive relief pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. § 9606 or § 9607(a), or Sections 7003 of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. § 6973, with regard to the Subsite.

41. In consideration of EPA's covenant not to sue in Paragraph 40 of this Consent Order, Respondents agree not to assert any claims or causes of action against the United States or its contractors or the Hazardous Substance Superfund, or to seek any other costs, damages, or attorney's fees from the United States arising out of response activities at the Subsite.

X. RESERVATION OF RIGHTS

42. Nothing in this Consent Order is intended to be nor shall it be construed as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, at law or in equity, which the United States, including EPA, may have against Respondents for:

- a) any liability as a result of a failure to provide ac-

cess, notice or otherwise comply with Article IV of this Consent Order;

b) any liability as a result of failure to exercise due care with respect to hazardous substances at the Subsite;

c) any liability resulting from exacerbation by Respondents of the release or threat of release of hazardous substances from the Subsite;

d) any and all criminal liability;

f) any matters not expressly included in the covenant not to sue set forth in Paragraph 40 of this Consent Order, including, without limitation, any liability for damages to natural resources at the Hastings Groundwater Contamination Site and any liability for areas of the Hastings Groundwater Contamination Site not included within the subsite.

43. Nothing in this Consent Order constitutes a covenant not to sue or to take action or otherwise limits the ability of the United States, including EPA, to seek or obtain further relief from Respondents, and the covenant not to sue in Paragraph 40 of this Consent Order is null and void, if information different from that specified in Paragraphs 9, 10, 11, 12, and 13 is discovered which indicates that Respondents fail to meet any of the criteria specified in Section 122 (g)(1)(B) of CERCLA, 42 U.S.C. § 9622 (g)(1)(B).

44. Nothing in this Consent Order is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in

law or in equity, which the United States, including EPA, may have against any person, firm, corporation or other entity not a signatory to this Consent Order.

45. Nothing in this Order shall be deemed to limit the power and authority of EPA, to take, direct or order all appropriate action to protect human health and the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances on, at, or from the Subsite or the Hastings Site.

46. EPA and Respondents agree that this Consent Order does not constitute an admission of any liability by Respondents. Respondents do not admit and retain the right to controvert in any subsequent proceedings, other than proceedings to implement or enforce this Consent Order, the validity of the Findings of Fact or Determinations contained in this Consent Order.

XI. CONTRIBUTION PROTECTION

47. Subject to the reservations of rights in Article X of this Consent Order, EPA agrees that by entering into and carrying out the terms of this Consent Order, Respondents will have resolved their liability to the United States for those matters addressed in the settlement as provided by Section 122(g)(5) of CERCLA, 42 U.S.C. § 9622 (g)(5), and shall have satisfied their liability for those matters within the meaning of Section 107 (a) of CERCLA, 42 U.S.C. § 9607 (a).

XII. Parties Bound

48. This Consent Order shall apply to and be binding upon the Respondents, their agents, officers, directors, employees, successors and assigns. The signatories represent that they are fully authorized to enter into the terms and conditions of this Consent Order and to legally bind the Respondents. In the event that Respondents transfer title or possession of the Subsite, they shall notify:

Office of Regional Counsel - Audrey Asher,
Assistant Regional Counsel
U. S. Environmental Protection Agency, Region VII
726 Minnesota Avenue
Kansas City, Kansas 66101

XIII. PUBLIC COMMENT

49. This Consent Order shall be subject to a thirty day public comment period pursuant to Section 122 (i) of CERCLA, 42 U.S.C. § 9622 (i). In accordance with Section 122 (i)(3) of CERCLA, 42 U.S.C. § 9622 (i)(3), EPA may withdraw consent to this Consent Order if comments received disclose facts or considerations which indicate that this Consent Order is inappropriate, improper or inadequate.

XIV. ATTORNEY GENERAL APPROVAL

50. The Attorney General or his designee has issued prior written approval of the settlement embodied in this Consent Order in accordance with Section 122 (g)(4) of CERCLA, 42 U.S.C. § 9622 (g)(4).

XV. EFFECTIVE DATE

51. The effective date of this Consent Order shall be the date upon which EPA issues written notice to Respondents that the public comment period pursuant to Paragraph 49 of this Consent Order has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Consent Order.

IT IS SO AGREED AND ORDERED:

BURLINGTON NORTHERN RAILROAD COMPANY, Inc.

BY:

Samuel Samuel

Date

2/15/91

PROJ21245

ZUBER COMPANY and

MORTON ZUBER

BY:

Morton Zuber

Date

2/15/91

U. S. ENVIRONMENTAL PROTECTION
AGENCY

BY: Martha Steinberg

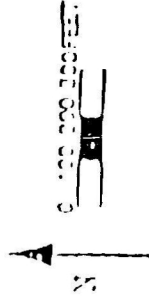
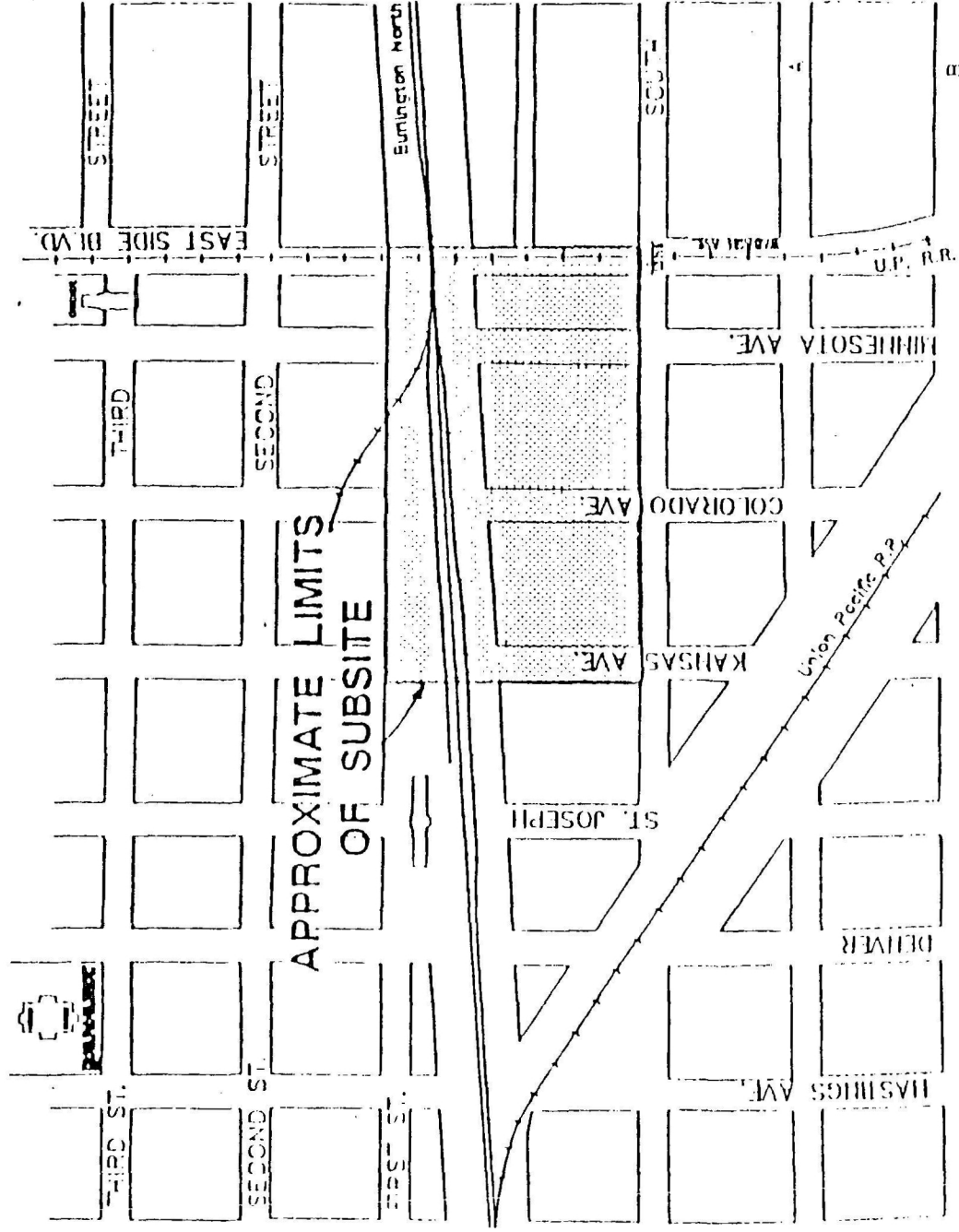
6/26/91



HASTINGS GROUND-WATER CONTAMINATION SITE
COLORADO AVENUE SUBSITE

ATTACHMENT

PROJ21248

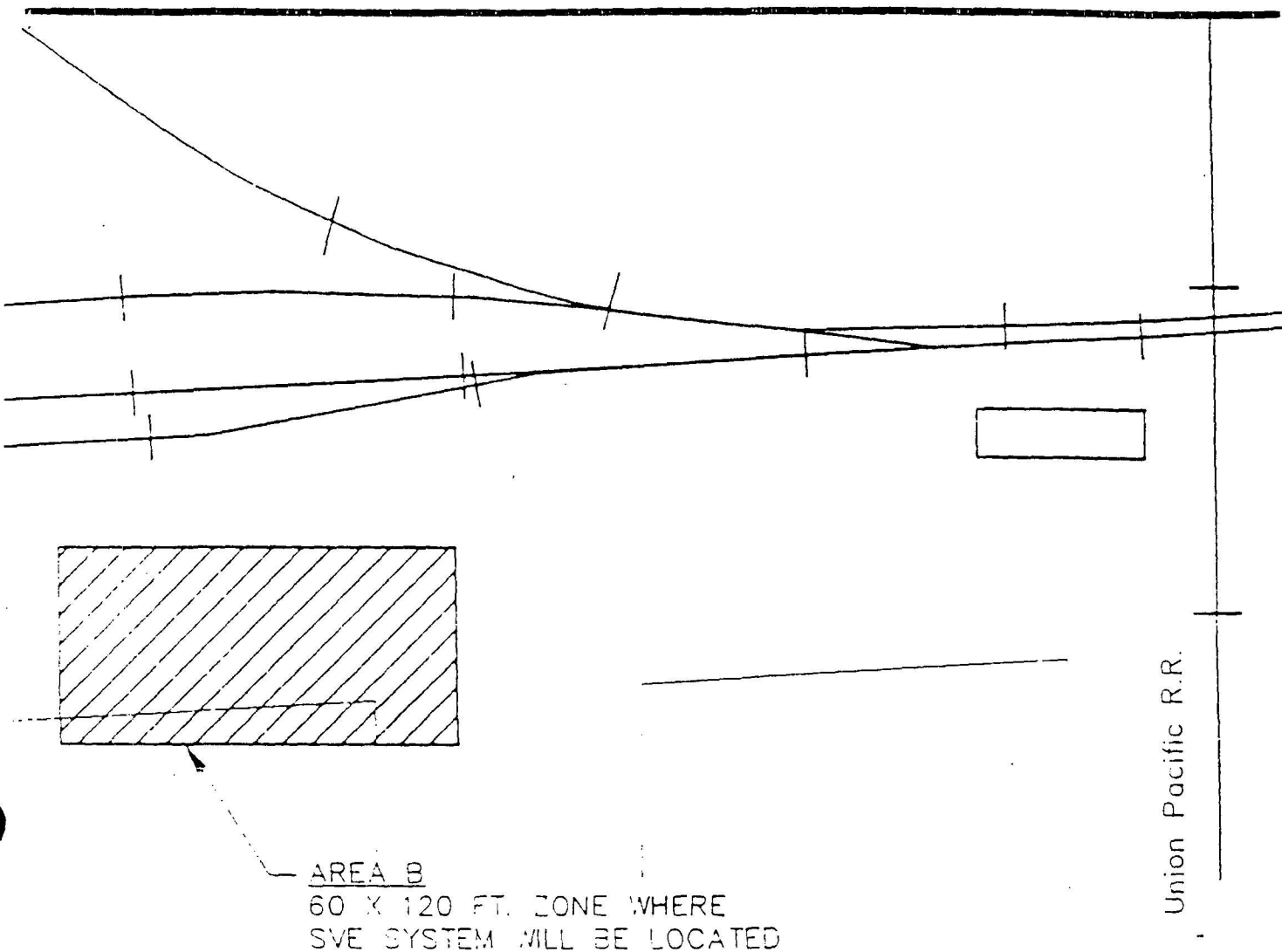


PRC Environmental Management, Inc.

HASTINGS GROUND-WATER CONTAMINATION SITE
COLORADO AVENUE SUBSITE

ATTACHMENT 2

PROJ21249



MINNESOTA AVE.

PROJ21250

FROM PRO
MANAGEMENT, INC.
05.01.90.

SCALE IN FEET

0 25' 50' 100'

ATTACHMENT 3

COLORADO AVENUE SUBSITE

HASTINGS GROUND-WATER
CONTAMINATION SITE



MK-ENVIRONMENTAL SERVICES
A DIVISION OF MK FERGUSON COMPANY

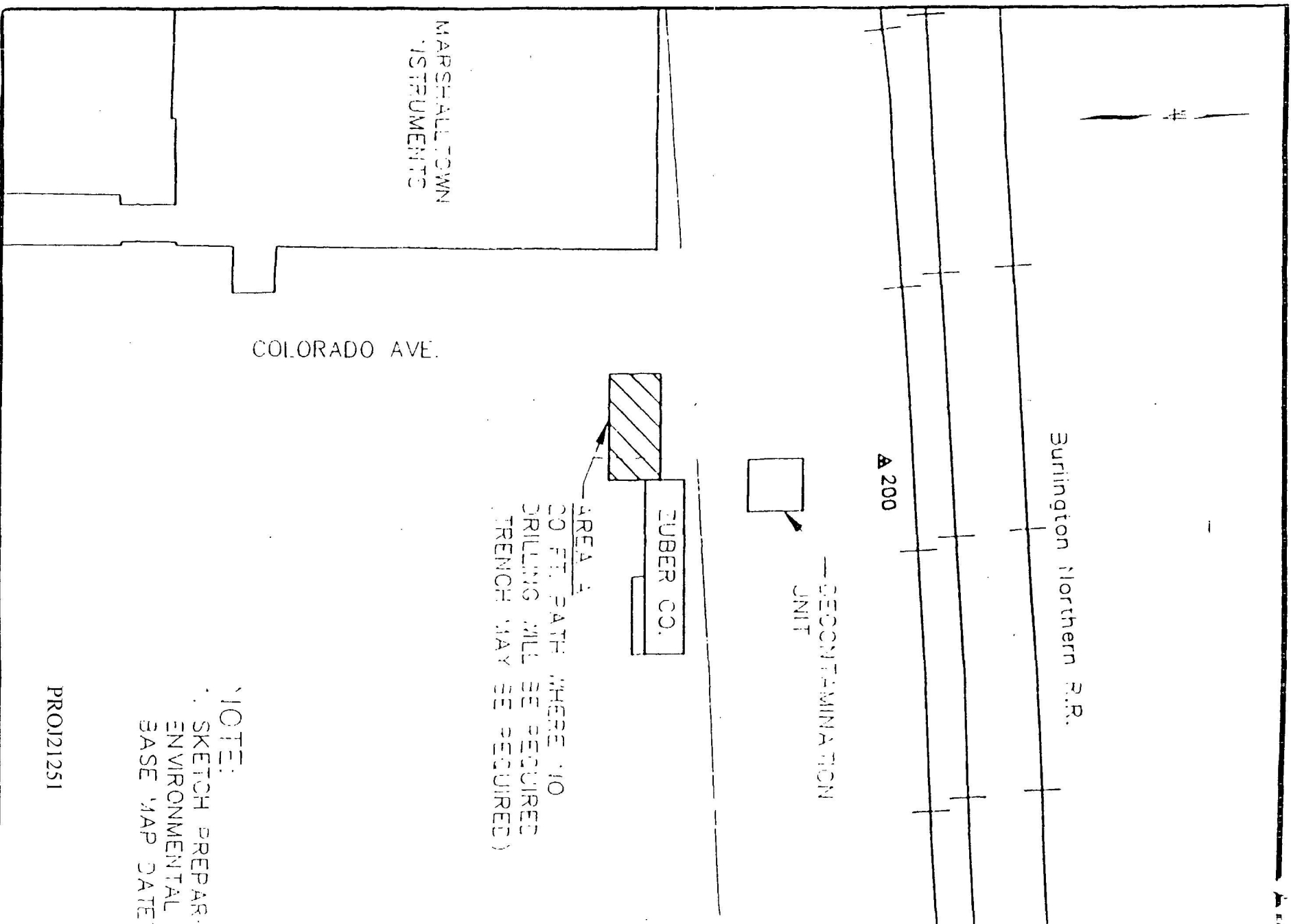
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SKETCH NO. 2704-09-SK-001

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07/06/90

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NOTE:
SKETCH PREPARED
ENVIRONMENTAL
BASE MAP DATE

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RESPONSIVENESS SUMMARY TO COMMENTS
ON PROPOSED DE MINIMIS SETTLEMENT
COLORADO AVENUE SUBSITE
HASTINGS GROUND WATER CONTAMINATION SITE

The United States Environmental Protection Agency (EPA) has proposed a de minimis settlement with two potentially responsible parties (PRPs) at the Colorado Avenue Subsite of the Hastings Ground Water Contamination Site: Burlington Northern Railroad Company, Inc. (BNRR) and Robert Zuber/Zuber Company (Zuber). This settlement has been proposed pursuant to Section 122(g)(1)(B) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"), 42 U.S.C. §9622(g)(1)(B). The comment period for the proposed de minimis settlement was opened from July 10, 1991 through September 9, 1991 and reopened from April 22, 1992 through April 27, 1992. During the first comment period, EPA received comments from Dravo Corporation (Dravo) and Marshalltown Instruments (Marshalltown) in opposition to the settlement. On March 31, 1992, BNRR, Zuber, Dravo, and Marshalltown met with the Regional Administrator of Region VII. During the second comment period, EPA received comments from Dravo, BNRR, and Zuber. The comments and the transcript of the March 31 meeting are attached hereto as Attachment 1 and incorporated herein. EPA's responses are set forth below and separated into the First Comment Period and the Second Comment Period.

FIRST COMMENT PERIOD

EPA received two sets of Comments submitted by Dravo on September 6, 1991, one directed toward the proposed settlement with Zuber and the other directed toward the settlement with BNRR. In these Comments, Dravo asserted that neither of the proposed settlers meets the de minimis criteria of Section 122(g)(1)(B) of CERCLA and EPA's Guidance on De Minimis Landowners (Landowner Guidance) published at 54 Fed. Reg. 34235, August 18, 1989.

Dravo presented three reasons that the settlement should not be entered for Zuber and the BNRR. First, Dravo asserted that ~~preliminary information contained in EPA studies or in Dravo~~

studies indicated that Zuber and BNRR have conducted or permitted the generation, transportation, storage, treatment or disposal of hazardous substances at the facility and have committed acts or omissions which have contributed to the contamination found at the Colorado Avenue Subsite. Second, Dravo asserted that the proposed settlement is improper because it does not provide for payment towards response costs. Third, Dravo commented that the proposed settlement will not encourage a global settlement between EPA and the remaining PRPs.

As background to its Comments, Dravo recited EPA's Findings of Fact in the proposed settlement at ¶8 which state that copntamination was present at the Colorado Avenue Subsite. Significantly, Dravo ignored EPA's Findings in ¶14 of the proposed settlement which identified the former Dravo property as a known source of the subsite contamination. This is a critical omission as it is one of the bases for EPA's Finding in the proposed settlement that the source of the Colorado Avenue Subsite contamination was neither Zuber nor BNRR.¹

EPA has considered both sets of the Comments with respect to Zuber and BNRR and responds to them jointly below. In the ensuing discussion, property owned by BNRR but used or leased by Zuber will be referred to as Zuber/BNRR property.

EPA's Response to Dravo's Comment: Facts Implicating Zuber and BNRR to Subsite Contamination

Dravo referred in its Comments to conclusions contained in a report written by Gibbs & Hill (G&H), a subsidiary of Dravo, which conducted an investigation of the Subsite in 1987. EPA reviewed the G&H report in 1988 and rejected several of its conclusions at that time. Dravo provided no new information in its Comments to cause EPA to alter its earlier response to the report. That report and EPA's response are contained in the Administrative Record for the Colorado Avenue De Minimis Settlement.

Dravo stated in its Comments that G&H's sampling of soil indicated elevated levels of trichlorethylene (TCE) and

¹ EPA's information regarding the source of the contamination at the Colorado Avenue Subsite consists in large part of analytical data which is contained in the REM II Report of Investigation, February 16, 1987 and is part of the Administrative Record for the Hastings Site. In addition, EPA's information also consists of what it learned through former Dravo and Hastings Industries, Inc. employees who stated that Dravo and its predecessor corporation, Hastings Industries, Inc., used trichloroethylene (TCE) as a degreasing solvent and that employees routinely poured the used solvent into a pit that led to one of the sewers.

tetrachlorethane (PCE) at various locations on the Zuber property, including the area at the storm grate.² Dravo concluded that the soil contamination was caused by "numerous chemical spills" on the Zuber property and that the contaminants migrated down into the storm sewer line. Dravo pointed out that G&H had found that the storm sewer line had several breaks underneath the Zuber property. Dravo then concluded that the contaminants that had migrated down to the storm sewer had exfiltrated back into the environment and/or discharged into the open ditch that is on the BNRR property that is east of the Zuber property.³

EPA agrees with some of Dravo's conclusions. EPA has collected data which indicates that soils on the Zuber/BNRR property are contaminated with TCE and PCE.⁴ However, EPA cannot confirm the levels of contamination as reported by G&H as the Agency was not given an opportunity to take split samples and was not provided sufficient information about the laboratory analyses to determine that the results were valid. EPA agrees that a storm sewer line runs underneath the Zuber/BNRR property and has breaks in it, although EPA has not confirmed that the locations of the breaks are in the spots designated by G&H. EPA agrees that sediment at an open ditch located on the BNRR property is contaminated with TCE. However, EPA does not agree with Dravo's conclusion that chemical spills by Zuber on the surface were the source of that contamination. EPA finds no technically plausible basis for Dravo's conclusion that solvents spilled onto the surface, migrated downward and entered the storm sewer through the breaks in the sewer line, then continued migrating downward several hundred feet, resulting in the extremely high levels of contamination that are found in the ground water.

EPA has examined other additional facts and has reached a different conclusion regarding the source of the contaminant plume that exists at the Colorado Avenue Subsite. EPA reviewed the results of a survey performed on the former Dravo and the present Zuber/BNRR properties. The results indicated that the former Dravo property, presently the Marshalltown property, is

² The storm grate, or surface grate, is identified on Attachment 2, attached hereto and incorporated herein.

³ See Attachment 2.

⁴ Results of EPA's sampling efforts are contained in the Administrative Record for the Hastings Site and the Administrative Record for the Colorado Avenue De Minimis Settlement.

twelve inches higher than the elevation on Zuber/BNRR property.⁵ Because of the higher elevation on the Marshalltown property, discharges from Marshalltown property would necessarily flow downward toward the Zuber/BNRR property. Discharges would have included cooling water and used solvent from Dravo and its predecessor corporation, Hastings Industries, Inc., as well as present discharges of cooling water from Marshalltown, runoff from the roof of the former Dravo plant, and runoff from curb grates on Colorado Avenue and all surrounding property.⁶ EPA's investigations at the Subsite revealed that there is no backflow control valve in the storm sewer line. EPA has observed that the storm sewer, which is less than twelve inches in diameter, feeds into several sumps.⁷ One of these sumps is located on Zuber property and has a grate on top of it. Samples collected by EPA at this location indicate that soil is contaminated by TCE at that location. EPA has concluded that because of the relatively small size of the sewer pipe, the lack of any backflow valve, and the volume of discharges going into it, tremendous pressure causes the discharges to surface. The discharges would also release into the open ditch east of this area on the Zuber/BNRR property because it is a low point that provides an opportunity for runoff from all surrounding property.⁸

In contrast to Dravo's explanation of the source of contamination, EPA has determined that the Colorado Avenue plume of contamination came into existence when solvents containing TCE and TCA were discharged through the sewer line on the former Dravo property, were then transported with the aid of gravitational flow and pressure from other surrounding discharges and subsequently released at the storm grate and the open ditch

⁵ Information regarding elevation is contained in a survey undertaken in 1989 by Davis Surveying and is included in the Administrative Record for the Colorado Avenue De Minimis Settlement.

⁶ This information has been provided to EPA from Marshalltown and Dravo.

⁷ EPA's observations are through its remedial project manager (RPM), Darrell Sommerhauser, who was assigned to the Hastings Site in 1984 and who has worked continuously on matters concerning the Colorado Avenue Subsite since that time. In addition, EPA's observations are through its contractors, Woodward-Clyde Consultants and PRC Environmental Management, Inc., whose work EPA oversaw.

⁸ EPA has knowledge through the remedial project manager's personal observations as well as information he received through interviews, that this ditch is filled with water almost all year round.

on the Zuber/BNRR property, causing the surface soils to become contaminated. In addition, due to breaks in the storm sewer line, the contaminants migrated into the ground water.

Dravo also commented that its consultants, G&H, had found a barrel on the Zuber/BNRR property labeled "Trichlor". Dravo did not state whether the barrel contained a liquid or whether the liquid, if present, was analyzed by G&H. Dravo provided no analytical results of sampling the contents of the "Trichlor" barrel. Dravo concluded, however, that the barrel labeled "Trichlor" was evidence that Zuber stored TCE on its property.

EPA disagrees with the foregoing conclusion. EPA's knowledge of the site is based largely on its site visits. Documents in the Administrative Record for the Hastings Site indicate that EPA has been present on the Zuber and BNRR property numerous times since EPA began its investigation of the site in 1985. EPA has frequently walked the property looking for appropriate places to install wells and bore holes. Representatives of the Nebraska Department of Environmental Control (NDEC), on behalf of EPA, were present on the Zuber property for several months in 1989 during the installation and operation of a soil vapor extraction system. No finding that hazardous substances were being stored, generated, treated, or disposed of on the Zuber property was ever made by EPA. Included in the Administrative Record for the Hastings Site are pictures of the Zuber property taken by G&H which depict heaps of scrap metal piled on the ground and stacks of empty barrels and barrels filled with scrap metal. EPA finds these photographs consistent with its own perspective of the property. EPA is aware that Zuber has stored scrap metal, five gallon drums and other material on its own property and along the BNRR tracks from Colorado Avenue to Minnesota Avenue. EPA is not aware, and the photographs do not depict, the storage of any solvents anywhere on Zuber's property. Nor has EPA ever observed the storage of solvents on Zuber's property.

In addition to site visits, the RPM, Darrell Sommerhauser, has had repeated conversations with Morton Zuber about his business practices. In all such conversations as well as in Zuber's response to EPA's Information Request, which is part of the Administrative Record for the Colorado Avenue De Minimis Settlement, Morton Zuber has clearly stated that he has not ever received liquid wastes in barrels.⁹ Similarly, in BNRR's response to EPA's Information Request, also included in the

⁹ EPA's Information Request to Morton Zuber and Zuber Company requested all information in the possession and within the knowledge of Zuber Company. Morton Zuber has attested that he started working in the Zuber Company business in 1947. See Attachment 1 for copy of Zuber's 1992 affidavit.

Administrative Record for the Colorado Avenue De Minimis Settlement, BNRR has stated it has not used, stored, or disposed of hazardous substances at the Hastings Site.

EPA first considered Dravo's allegation concerning Zuber's storage of TCE in 1987 when Dravo presented that charge to the Agency. EPA concluded at that time that there was insufficient information from which to conclude that the allegation was true and proceeded to perform additional sampling of the Zuber property and the surrounding areas. EPA has reevaluated its earlier decision in response to Dravo's Comments. Based on all the data EPA has gathered and the data presented by Dravo, EPA has determined once again that there is no credible information that the barrel labeled "Trichlor" was ever filled with TCE or any other hazardous substance while it was stored on the Zuber property.

Dravo also concluded that certain soil discoloration found by G&H was indicative of a spill of TCE, trichloroethane (TCA), or PCE as the stains were located in an area where many drums were piled. EPA finds this conclusion unsupportable, based on the known facts. While discoloration of soil does occur when certain liquids are spilled, the contaminants of concern, TCE, TCA and PCE, are all colorless liquids; stained soil therefore can not be attributed to spillage of these contaminants.

Another of Dravo's comments related to Zuber property being the source of ground water contamination. Dravo commented that if the principal source of ground water contamination were, as EPA believes, the former Dravo property at the location of the storm sewer, the highest concentrations of volatile organic compounds would be at or adjacent to the storm sewer on the former Dravo property. Dravo stated in its Comments that the highest level of soil contamination was located on the Zuber property at soil boring 9 (SB-9) where TCE was found to be present at the level of 890 parts per billion (ppb). This is not the case. Data provided to Dravo in July 1988, contained in the Administrative Record for the Colorado Avenue De Minimis Settlement, indicated that the highest level of TCE soil contamination, 3600 ppb, was located on the former Dravo property at soil boring (SB-10) adjacent to and immediately below the storm sewer line at Colorado Avenue.

Dravo noted in its Comments that ground water contamination has been found by EPA to be present on the Zuber and BNRR property. EPA agrees but does not consider this fact to be proof that Zuber and BNRR are the source of the ground water contamination. No ground water sampling has ever been conducted by EPA on the former Dravo property due to the presence of the former Dravo manufacturing plant, now Marshalltown, which occupies most of the former Dravo property. Without sampling the ground water underneath the manufacturing facility, EPA can not

conclude that the ground water underlying Marshalltown is uncontaminated.

Dravo referenced the extensiveness of the soil contamination found by EPA to be present on the Zuber and BNRR properties. However, as the sampling maps (attached hereto and incorporated herein as Attachment 3 and 4) indicate, the soil sampling was primarily conducted on the Zuber and BNRR properties. The fact that not more samples were taken on Zuber/BNRR properties only indicates that that property is more accessible for sampling. Only four soil borings were sampled on the former Dravo property. EPA does not dispute the presence of contamination on the Zuber property but, as stated above, finds no credible evidence that Zuber property is the source of any contamination.

EPA's Response to Dravo's Comment: Zuber and BNRR Do Not Qualify for a De Minimis Settlement

Dravo commented that neither Zuber nor BNRR meets the criteria of Section 122(g)(1)(B) of CERCLA, the de minimis settlement provision. Dravo stated that there is no evidence that Zuber or BNRR did not conduct or permit the disposal of hazardous substances at the Subsite and no evidence they did not contribute to the release or threat of release of hazardous substances at the Subsite. Dravo made these comments without taking into account the responses that Zuber and BNRR provided to EPA in the Information Requests and the fact that EPA has interviewed Zuber and been present on the Zuber/BNRR property numerous times since 1985 and has not found any information that would contradict the statements both parties have made to the Agency.

Dravo cited G&H's findings at the Zuber property of piles of debris, soil staining, and a barrel marked "Trichlor", as evidence to refute EPA's finding that Zuber and BNRR meet the de minimis criteria of CERCLA. While the appearance of real property may suggest that hazardous substances were used there, the lack of corroborating evidence and the information referenced previously in this document regarding disposal of solvents from the Dravo plant, the downward slope to Zuber/BNRR property, the numerous discharges into the storm sewer, the lack of a backflow valve, etc. have formed the basis of EPA's conclusion that Zuber/BNRR property became contaminated as a result of acts of the adjacent landowner and not as a result of their own acts or omissions.

Dravo also commented that Zuber and BNRR should be able to establish a third party defense under CERCLA. This comment was augmented by Dravo in its Second Set of Comments and will be responded to in that section of this document.

EPA's Response to Dravo's Comment: The Proposed Settlement is Unfair and Contrary to the Requirements of CERCLA Section 122(g).

Dravo further commented that the proposed settlement is unfair and contrary to the requirements of Section 122(g) of CERCLA. Dravo based this objection on its construction of Section 122(g) of CERCLA to require a monetary contribution from a de minimis settlor. EPA disagrees with this interpretation. The legislative history Dravo quotes in its Comments refers to de minimis settlements under Section 122 (g)(1)(A), which applies to de minimis contributors, not to de minimis landowners. Both the de minimis provision of CERCLA and EPA's Landowner Guidance distinguish between contributor settlements under Section 122 (g)(1)(A) and landowner settlements under Section 122(g)(1)(B). A settlement under Section 122 (g)(1)(A) involves a contributor who has no viable defense to liability. A settlement under Section 122 (g)(1)(B) involves a landowner who may ultimately be able to prove a third party defense. EPA has stated in its guidance document at 54 Fed. Reg. 34240:

"All landowners who enter into de minimis settlements should be required to provide access to the property and cooperation in the Agency's response activities. In specific cases, it may be appropriate to obtain cash payments for the response activities at the site."

Neither the precise language of Section 122(g) nor EPA's published interpretation of Section 122(g) support Dravo's argument that a de minimis landowner settlement must require cash payment from the settlor.

EPA's Response to Dravo's Comment: Access to the Property Owned or Leased By Zuber/BNRR Can Be Obtained by Other Means.

While Dravo acknowledged in its Comments that the proposed settlement would grant an irrevocable right of access for EPA, the NDEC, and all other persons performing response actions under EPA's oversight, Dravo overlooked two other provisions of the settlement which provide a benefit to EPA, NDEC, and all other persons performing response actions under EPA's oversight. Zuber is required to clear the property of scrap metal and other personal property within 30 days of a request (§32 of proposed settlement). Further, upon transfer of title to the property, Zuber and BNRR must require the new owner to grant access under the same conditions that Zuber and BNRR have been required.

EPA considers the access Zuber and BNRR are granting to be valuable consideration particularly because Zuber and BNRR are providing an area of their property for implementation of response actions on a continuous basis while soil remediation is

underway. It is expected that Zuber and BNRR will also be required to dedicate a portion of their property for response actions when the ground water remediation is underway. In addition, EPA is aware that Zuber incurred costs to move scrap metals during EPA's investigation and during the installation of soil vapor extraction (SVE) wells for a pilot study.¹⁰ EPA is also aware that Zuber will be incurring additional costs whenever he is required to clear the area for access, as additional labor as well as heavy equipment may be necessary to move tons of scrap metal.

Dravo stated that it has filed a contribution action against Zuber and BNRR in the District Court of Nebraska and urged EPA to defer to the district court to equitably allocate the response costs among the parties found to be liable. The fact that litigation has been initiated by Dravo is not an appropriate ground to refuse to finalize this settlement. Indeed, the very purpose of a landowner de minimis settlement is to give a party who has a viable defense legal repose and enable that party to avoid litigation costs. EPA also rejects Dravo's suggestion that the Agency defer to the expertise of the court to determine allocation of costs. While this suggestion is consistent with Dravo's filing of a contribution action against Zuber and BNRR, EPA disagrees, based on its finding that Zuber and BNRR have a defense to liability and consequently, have no liability to be allocated.

Response to Comments of Marshalltown Instruments

EPA received Comments submitted by Marshalltown Instruments (Marshalltown) on September 4, 1991. Marshalltown reasserted the position stated in its letter to EPA of July 19, 1991 that it is inappropriate for EPA to consider any settlement with Zuber and BNRR unless that settlement includes Marshalltown.¹¹ Marshalltown also stated its understanding that Dravo presented data to EPA indicating Zuber and BNRR are responsible for the Colorado Avenue contamination.

As stated in EPA's response to Dravo's Comments, no new information was presented by Dravo indicating Zuber and BNRR are responsible for Colorado Avenue Subsite contamination. Also, no

¹⁰ The SVE system was installed on BNRR property leased by Zuber and remains on that property today.

¹¹ Marshalltown's July 19, 1991 letter to EPA and EPA's response to it are attached to this Responsiveness Summary as Attachment 5 and incorporated herein.

new information was presented by Marshalltown to EPA in the September 4 letter. However, EPA has reconsidered Marshalltown's argument and has assumed arguendo that no contractual relationship exists between Marshalltown and Dravo. Even with that assumption, EPA reaches the same conclusion it had reached earlier -- that Marshalltown does not qualify for a de minimis settlement.

In order to qualify for a de minimis settlement under Section 122(g) of CERCLA, a party must meet the criteria for either a contributor under Section 122 (g)(1)(A) or for an owner under Section 122(g)(1)(B). Marshalltown, as an owner, must meet the criteria of Section 122(g)(1)(B). However, as Section 122 (g)(1) states immediately following Section 122(g) (1)(B):

This subparagraph (B) does not apply if the potentially responsible party purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.

Since Marshalltown's purchase of the former Dravo property included the liquid bulk tank and vapor degreaser used by Dravo, Marshalltown had actual or constructive knowledge that at the time of purchase, hazardous substances (solvents used in vapor degreasing) were stored on the property.

As discussed in response to Comments from Dravo, Zuber and BNRR acquired their properties at the Colorado Avenue Subsite before Dravo began disposing of hazardous substances at the subsite. There is no evidence that prior to ownership of the properties by Zuber and BNRR, their properties were used to generate, transport, store, treat, or dispose of any hazardous substance. The circumstances surrounding the acquisition by Marshalltown of its property at the Colorado Avenue Subsite are markedly different; Marshalltown is not in the same situation as Zuber and BNRR and therefore does not qualify for a de minimis settlement.

SECOND COMMENT PERIOD

During the second comment period, Dravo, BNRR, and Zuber submitted comments. EPA's responses are separately set forth below for each of these commentors.

Dravo Corporation

Dravo commented that EPA accepted Zuber's "bald claims" that he fit the de minimis criteria of CERCLA and did not check the veracity of Zuber's claims. Contrary to this assertion, EPA did issue an Information Request to Zuber, as noted earlier in this Responsiveness Summary. Zuber responded to the Information

Request, which is more than a "bald claim", as he subjected himself to penalties and criminal prosecution for any intentional misrepresentation made. Moreover, in addition to relying on information contained in Zuber's and BNRR's responses to their Information Requests, EPA has relied on site reconnaissance information, personal interviews with Zuber and his employees and with former Dravo employees, information from Marshalltown regarding discharges from the manufacturing plant, information from the 1987 G&H report, analytical data, and survey information.

Dravo also commented that Zuber cannot be eligible for a de minimis settlement that requires no cash payment unless there is a very high probability that Zuber would prevail at trial in establishing a third party defense. EPA agrees that in order for a landowner to be eligible for a de minimis settlement, there must be a high probability that the landowner could establish a third party defense to liability under Section 107(b)(3) of CERCLA. As set forth in EPA's Landowner Guidance, a landowner whose property is contaminated by an adjacent landowner has a defense under Section 107(b)(3) as long as he can demonstrate that he exercised due care with respect to the hazardous substance concerned and took precautions against foreseeable acts or omissions of the party who caused the release and the consequences that could foreseeably result from such acts or omissions. EPA has been present on the Zuber property to drill and install wells, insert soil probes, collect ground water and soil-gas samples, and oversee the operation of a soil vapor extraction system. Zuber has never interfered with any of this work. EPA has no knowledge of any acts that Zuber did to affect the contamination present on his property. It is EPA's position that there is a high probability that Zuber would prevail in establishing a Section 107(b)(3) defense if the issue were litigated.

Dravo also commented that "...Zuber is not eligible for a de minimis landowner settlement unless Morton Zuber's acquisition of the property was preceded by a due care inquiry that left Zuber with no reason to know the property's soils and ground water contained hazardous pollutants." EPA does not agree that Zuber was under a duty to make a due care inquiry nor that if such an inquiry were made, it would result in Zuber having reason to know the property was contaminated.

Dravo commented that Zuber had good reasons to suspect that the property's soils and ground water might be contaminated as reports of contamination in city wells appeared in The Hastings Tribune during 1983 and 1984. EPA agrees that because of the detection of ground water contamination in Hastings in 1983, and Zuber's legal acquisition of the property in 1984, Zuber had a duty to make "all appropriate inquiry" into prior uses of the property.

Dravo further commented that a due care inquiry was required because the property was not acquired by bequest, although so stated in the proposed settlement. Rather, Zuber acquired the property by quitclaim deed from his mother, Bettie Zuber.¹² Zuber attested that the property was deeded to him as a gift.¹³ As stated in EPA's Landowner Guidance, what constitutes "all appropriate inquiry" is determined in light of all the facts and circumstances surrounding the acquisition of the property. The transfer of property to Morton Zuber from his mother, given as a gift, was clearly not an arm's length commercial transaction where a buyer purchases property from a stranger without any knowledge of prior usage of the property. Moreover, Zuber had actual knowledge of the operations at Zuber Company for many years prior to the discovery of contamination at the Hastings Site as he had worked for Zuber Company since 1947 and managed the company since 1958.¹⁴ Based on those two factors, the intra-family transfer of property and Zuber's personal familiarity with the use of the property, EPA has determined that an appropriate level of inquiry should be judged against lenient standards. EPA also recognizes that the court in United States v. Pacific Hide & Fur Depot, Inc., 716 F. Supp. 1341 (D.Idaho 1989) determined that the nature of the inquiry for parties who acquired property as a gift was very lenient and in fact required no affirmative inquiry.

Morton Zuber has consistently stated to EPA in informal interviews and written responses that Zuber is a scrap metal business that has used neither solvents nor chemicals. EPA has determined in this matter, consistent with the Pacific Hide case, that no affirmative inquiry into the uses of the property was required, based on the nature of the acquisition and Zuber's long term familiarity with the uses of the property.

In addition, because Zuber had no actual or constructive knowledge that the property had ever been used for the generation, transportation, storage, treatment, or disposal of

¹² The proposed settlement erroneously stated that Zuber acquired the property by bequest. While Zuber was deeded the property from his mother as a gift, it was by quitclaim deed during her lifetime. The final settlement has been corrected to reflect this fact.

¹³ See Attachment 1 for 1992 Affidavit of Morton Zuber.

¹⁴ In Zuber's 1987 affidavit contained in the G&H report and Zuber's 1992 affidavit contained in Attachment 1, Zuber attests to the fact that he worked at Zuber Company since 1947 and that he managed the Zuber Company since 1958.

any hazardous substance, Zuber does not fall into the exception to Section 122(g)(1)(B) which states:

"This subparagraph (B) does not apply if the potentially responsible party purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance."

In response to Dravo's comment that Zuber does not meet the Section 122(g) de minimis criteria, EPA finds that Zuber is eligible for a de minimis settlement because he meets the criteria of Section 107(b)(3) of CERCLA, as discussed above, as well as the criteria of Section 122(g)(1)(B).

Dravo also addressed comments specifically to the BNRR settlement. Dravo states that a settlement with BNRR would be an abuse of EPA's discretion, as Dravo assumes that EPA never sent an Information Request to BNRR. As stated earlier in this Responsiveness Summary, EPA issued an Information Request to BNRR. The request and its response are contained in the Administrative Record for the Hastings Site.

Dravo commented that BNRR has a contractual relationship with Zuber, as that term is defined in Section 101(35)(A) of CERCLA, and concludes from that premise that BNRR does not meet the criteria for a de minimis settlement for the same reasons that Zuber does not meet the de minimis criteria. EPA agrees that BNRR and Zuber have a contractual relationship as defined under CERCLA. However, EPA considers that fact irrelevant as the contractual relationship between Zuber and BNRR does not transfer liability from Zuber to BNRR since EPA considers Zuber to have available to it a defense to liability.

Dravo also commented that not requiring any cash payment from BNRR is inappropriate under the conditions set forth in EPA's Landowner Guidance. EPA disagrees because it considers, consistent with the guidance, that there is a high probability that BNRR could meet the burden of proving the CERCLA defense to liability at trial, just as it considers that high probability to exist with regard to Zuber. EPA has no knowledge that BNRR, like Zuber, has ever acted in a manner that would adversely affect the contamination present on BNRR property. BNRR has never interfered with any response actions conducted on BNRR property. EPA has no knowledge that BNRR ever stored, generated, transported, treated, or disposed of any hazardous substance on its property, but EPA has undisputed information that Dravo, previously the adjacent landowner, did dispose of the kind of hazardous substance that is found in the BNRR soils. This undisputed information and the information, discussed previously, which supports EPA's conclusion as to how the contamination

migrated to the BNRR/Zuber property, forms the basis of EPA's conclusion that there is a high probability that BNRR could successfully establish a CERCLA defense at trial.

Dravo commented that access is meager consideration to the public for the granting of contribution protection. EPA agrees that in some cases, the granting of access would not be sufficient consideration for the kind of contribution protection the settlers would be receiving. However, EPA views access as significant because it involves entry onto the Zuber/BNRR property for an indefinite period of time and in a manner that affects the Zuber business. EPA is aware that the volume of business Zuber handles is directly related to the amount of square feet available to stockpile scrap metal, EPA therefore recognizes that by granting access to EPA to remediate the soils and ground water at the Site, Zuber is making an in-kind contribution. BNRR is similarly making an in-kind contribution because it leases some of its property to Zuber. Zuber will have no need to lease property that he is not able to use.

Zuber Company and Morton Zuber Comments

Zuber commented that the contamination of the property was caused solely by third persons with whom Zuber had no contractual relationship. Zuber provided technical reasons as a basis that the source of the contamination was the former Dravo property. Zuber stated that the significant mass of contaminants in the ground water is consistent with long-term discharge of significant quantities of contaminants and cited EPA's report that stated there are over 9 tons of TCE in the ground water below the storm sewer line. Zuber also commented that backflow from the storm sewer inlet grate has the potential to carry contaminants from the storm sewer inlet grate onto the surrounding ground surface area. EPA has reached the same conclusion as to the cause of the surface contamination.

Zuber further commented by concurring with EPA's response in 1988 to the G&H report. Specifically, Zuber agreed that the storm sewer, which has numerous breaks in it, is a major pathway for contaminant transport; that backflow from the storm sewer grate has the potential to carry contaminants onto the surrounding ground surface area; and that the high levels of TCE at depth indicate a long-term discharge.

Zuber also commented that the one barrel labeled "Trichlor" located on his property is not evidence that the barrel contained TCE when it was on the Zuber property. In light of the undisputed fact that Zuber has dealt in scrap metal and has routinely stored hundreds of barrels to be used as containers for the scrap, EPA agrees that the labeling on a barrel is not conclusive evidence of storage.

Zuber commented that he has had no contractual relationship with Dravo. EPA agrees as it has no evidence of such. Zuber commented that the quitclaim deed from Zuber's mother does not affect Zuber's eligibility for a de minimis settlement. EPA agrees that this fact is immaterial to a finding of eligibility for a de minimis settlement as EPA has found that the contamination on the Zuber property was caused solely by the acts of a party with whom Zuber had no contractual relationship and that he used due care with respect to the contamination and took precautions against foreseeable acts or omissions by the party whose acts caused the contamination.

Zuber commented that the proposed settlement would be in the public interest because the very purpose of the de minimis settlement process is to provide parties finality and relieve them of prolonged and costly litigation. EPA agrees that by entering into this settlement, it is fulfilling the mission with which it was charged by Congress to resolve liability of landowners who meet the de minimis criteria of CERCLA.

Burlington Northern Railroad Company Comments

BNRR commented that it meets the de minimis criteria of CERCLA because the release of hazardous substances was caused solely by the acts or omissions of Hastings Industries, Inc., Dravo, and/or Marshalltown. Since BNRR has no contractual relationship with any of these parties, it does not acquire their liability. EPA agrees with BNRR's statement regarding the source of contamination to the extent that it considers the source to be the former Dravo property, as discussed previously in this document.

BNRR commented that the proposed de minimis settlement is in the public interest. BNRR cited CERCLA's strong public policy favoring settlement. In addition, BNRR stated that the proposed settlement would facilitate the remediation of the site as the right of access is irrevocable and does not expire should BNRR or Zuber sell or lease their properties. EPA agrees that the grant of access will facilitate remediation. Furthermore, EPA has been advised by Dravo and BNRR that their private negotiations for access have not been successful. Further, although Zuber has granted access to EPA in the past, Zuber has not acted expeditiously to clear the space that was needed to perform the response actions. This proposed settlement would require Zuber to clear space within thirty days of notice.

BNRR commented that Dravo's allegations of "meager consideration" do not form a basis for a finding that the proposed settlement is not in the public interest. BNRR asserted that the grant of access is not meager consideration as it is extensive and continuous; BNRR will receive no compensation for the grant of access; BNRR's own use of its land will be limited

by the grant of access; and the potential to incur penalties for violating the terms of the proposed settlement is not meager consideration. EPA agrees that under the facts in this matter, the grant of access constitutes an adequate consideration to find that the proposed settlement is in the public interest.